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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 BERNARD LOVE,
13

14 Plaintiff,

15 vs.

16 BAY AREA CABLEVISION, INC.,
a California corporation,

17 Defendant.
18

Case No.: C0802012HRL

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR REMAND

Action Date: January 14, 2008

Hearing Date: June 3, 2008

Trial Date: Not Set

Courtroom: 2
19

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21 The plaintiff, Bernard Love, through counsel, Lichtenfels, Pansing &
22 Miller, P.C. and Anthony E. Bell Law Offices, Inc., submits the following
23 Memorandum of Points and Authorities in support of his Motion for
24 Remand.
25

BACKGROUND

This action involves an agreement purportedly entered into between the parties, in which the plaintiff purported to assign his rights and interest in an FCC broadband license for the San Jose, California area (the “License”) to defendant Bay Area Cablevision, Inc. The plaintiff was issued the License by the FCC in about 1993 (Complaint at ¶ 4). The plaintiff then entered into a lease of the License (Complaint at ¶ 6, Exhibit 1). In 1996, a document entitled Agreement for the Assignment of MMDS License (“Assignment Agreement”) was executed (Complaint, Exhibit 2). The Assignment Agreement purported to transfer the plaintiff’s rights and interest in the License to defendant Bay Area Cablevision, Inc. The Plaintiff alleges that the signature on the Assignment Agreement purporting to be his was forged, and that the Assignment Agreement was executed without his knowledge or assent (Complaint at ¶¶ 7-10).

Based upon the Assignment Agreement, Bay Area Cablevision applied to the FCC for approval of the transfer of the license. The FCC eventually granted Bay Area Cablevision’s application for transfer of the License in 1998 (Complaint at ¶¶ 11-13).

The Complaint sets forth two causes of action. The First Cause of Action seeks declaratory relief pursuant to California C.C.P. §1060. In this claim, the plaintiff seeks an adjudication that the Assignment Agreement is void and invalid, and seeks a declaration setting aside the transfer of plaintiff’s right and interest in the License which is effected by the Assignment Agreement (Complaint at ¶¶ 18-21). The Second Cause of

1 Action seeks an accounting from defendant Bay Area Cablevision, Inc. of its
 2 profits realized from the allegedly fraudulent transfer of the License
 3 (Complaint at ¶ 23).

4 ARGUMENT

5 Defendant Bay Area Cablevision, Inc.'s Notice of Removal is
 6 premised on 28 U.S.C. §1441(b), which provides that a civil action over
 7 which the district courts have original jurisdiction, founded on a claim
 8 arising out of the Constitution, treaties or laws of the United States, shall be
 9 removable to the federal district courts. This case is not founded on any
 10 claim or right arising under federal law, and the case is accordingly not
 11 properly removable to this Court under §1441(b).

12 28 U.S.C. §1441(b) is to be strictly construed against removal
 13 jurisdiction. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir.
 14 1988) . The Court must reject federal jurisdiction of there is any doubt as to
 15 whether removal is proper. *Duncan v. Stuetzle*, 76 F. 3d 1480, 1485 (9th Cir.
 16 1996); *Gaus v. Miles, Inc.* 980 F.2d 564, 565 (9th Cir. 1992). The removing
 17 defendant bears the burden of proving the propriety of removal. *Duncan v.*
Stuetzle, *supra*, 76 F.3d at 1485.

18 The removal jurisdiction created by §1441(b) is coextensive
 19 with the “federal question” original jurisdiction provided by 28 U.S.C.
 20 §1331. *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 118
 21 S. Ct. 2047, 141 L. Ed. 2d 364 (1998); *Crawford v. East Asiatic Co.*, 156 F.
 22 Supp. 571 (D.C. Cal. 1957). An action arises under federal law within the
 23 meaning of §§1331 and 1441(b) if either: (1) federal law creates the cause
 24 of action; or (2) the plaintiff's right to relief necessarily depends on the
 25

1 resolution of a substantial question of federal law. *City of Chicago v.*
2 *International College of Surgeons*, 522 U.S. 156, 164, 118 S. Ct. 523, 139 L.
3 Ed. 2d 525 (1997); *Swords to Plowshares v. Kemp*, 423 F. Supp. 2d 1031,
4 1033 (N.D. Cal. 2005). A state-law claim may be treated as one “arising
5 under” federal law only where the vindication of the state-law right asserted
6 necessarily turns on some construction of federal law. *Franchise Tax Board*
7 *v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S. Ct.
8 2841, 77 L. Ed. 2d 420 (1983); *Swords to Plowshares v. Kemp*, supra, 423
9 F. Supp. 2d at 1033. In order for federal-question jurisdiction to exist, a
10 substantial proposition of federal law must form a direct and essential
11 element of the plaintiff’s cause of action. *Eyak Native Village v. Exxon*
12 *Corp.*, 25 F. 3d 733, 735 (9th Cir. 1994). The existence of federal-question
13 jurisdiction is governed by the ‘well-pleaded complaint’ rule, which
14 provides that federal jurisdiction exists only when a federal question is
15 presented on the face of the plaintiff’s properly pleaded complaint.
16 *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 95 L. Ed.
17 2d 318 (1987).

18 This case is not properly removable under §1441(b), applying the
19 criteria discussed above. First, the plaintiff’s claims for relief rest on state
20 law rather than federal law. The Complaint raises issues as to whether the
21 Assignment Agreement, and the transfer of plaintiff’s rights in the License
22 effectuated by that Agreement, are void. The claims for relief stated in the
23 Complaint involve state-law issues relating to the validity and formation of
24 contracts, and accounting.
25

1 The plaintiff's right to the relief requested in its Complaint does not
2 depend on the resolution of any question of federal law. As noted above, the
3 plaintiff's Complaint seeks a judicial determination as to the validity of the
4 Assignment Agreement purportedly executed in 1996. The plaintiff is also
5 seeking a judicial determination as to the validity of the purported transfer of
6 plaintiff's rights in the License which is effectuated by that agreement.
7 However, contrary to defendant Bay Area Cablevision, Inc.'s contention in
8 its Notice of Removal, the plaintiff is not seeking any judicial determination
9 as to whether or not the FCC must recognize the plaintiff as the rightful
10 holder of the License, nor is the plaintiff seeking any judicial determination
11 regarding the validity of the FCC's approval of the transfer of the License in
12 1998. The FCC is not a party to this case; the plaintiff is not seeking an
13 order directed to the FCC regarding its approval of the transfer of the
14 License, either under 28 U.S.C. §1361 or otherwise.

15 Regulation of use of the electromagnetic spectrum is governed by the
16 Federal Communications Act, 47 U.S.C. §301, et. seq. Under the Act, the
17 FCC is granted exclusive authority to regulate and issue licenses for use of
18 the electromagnetic spectrum (47 U.S.C. §307), and to review and approve
19 any proposed assignment or transfer of any license issued by it (47 U.S.C.
20 §310(d)). In the event that the plaintiff is successful in obtaining the
21 requested judicial determination that the Assignment Agreement is void, the
22 FCC could certainly consider this determination in reviewing its 1998
23 approval of the transfer of the License from the plaintiff to the defendant, in
24 an appropriate administrative proceeding pursuant to regulations
25 promulgated under §310(d). However, the plaintiff is not seeking a

1 determination in this case as to the propriety of the FCC's approval of the
2 transfer of the License to the defendant; indeed, such relief is not available
3 under applicable law.

4 Although the defendant is correct in stating that approval of the
5 transfer of an FCC license is subject to federal law, federal law itself vests
6 exclusive authority to determine the propriety of such license transfers in the
7 FCC. The plaintiff does not, and cannot, seek a determination in this case as
8 to the propriety of the FCC's 1998 approval of the transfer of the License to
9 the defendant. The resolution of the claims that the plaintiff does assert in
10 this case will not involve the application or interpretation of any provision of
11 the Federal Communications Act, or any other provision of federal law. As
12 the plaintiff's right for relief under the claims asserted in the Complaint does
13 not depend on the resolution of any question of federal law, defendant's
14 removal of this case to this Court is improper, and the case should be
15 remanded.

16 CONCLUSION

17 For the reasons stated herein, the plaintiff respectfully requests that
18 the Court remand the within civil action to the Superior Court for the County
19 of Santa Clara, State of California.

20 Dated: April ____, 2008.

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ATTORNEYS FOR PLAINTIFF

PROOF OF SERVICE

I, Kathleen Travis, in the City and County of Denver, State of Colorado. I am over the age of 18 and not a party to the within action. My business address is: 885 South Colorado Boulevard, Denver, Colorado 80246, and my email address is: kat@lpmlaw.com.

On April 22, 2008, I caused to be served on the interested parties in said action within:

1. Memorandum of Points and Authorities in Support of Motion
for Remand.

by placing a true copy thereof in sealed envelope(s) addressed as stated below and causing such envelopes(s) to be deposited in the U.S. Mail at Denver, Colorado:

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☐ **BY PERSONAL DELIVERY** – I caused document(s) to be hand delivered via Western Messenger to party by close of business day today.

☒ **BY MAIL** – I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Denver, Colorado in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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1 received electronic confirmation from the facsimile machine that document was successfully transmitted
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3 [] **BY OVERNIGHT DELIVERY** – Depositing the above document(s) in a box or other
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5 paid or provided for.

6 [] **BY E-MAIL** – I caused a true copy of the foregoing document(s) to be served by
7 electronic email transmission at the time shown on each transmission, to each interested party at the email
8 address shown above. Each transmission was reported as complete and without error.

9 I declare that I am employed in the office of a member of the bar of this Court at whose direction
10 the service was made.

11 Executed on April ____, 2008, at Denver County, Colorado.

12 _____
(type or print name)

13 _____
(signature)